VOICE MINISTRIES OF FARMINGTON, INC.

IBLA 90-58 Decided December 4, 1992

Appeal from a decision of the Albuquerque District Office, New Mexico, Bureau of Land Management, requiring payment of initial rental charges for communications site right-of-way. NM 71400.

Affirmed.

1. Appraisals--Estoppel--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   BLM properly requires the holder of a communications site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way.

APPEARANCES: R. Thomas Dailey, Esq., Farmington, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Voice Ministries of Farmington, Inc. (Voice Ministries), has appealed from a decision of the Albuquerque District Office, Bureau of Land Management (BLM), dated September 19, 1989, requiring it to pay additional rental charges for communications site right-of-way NM 71400.

On July 15, 1988, Voice Ministries filed an application for a right-of-way for the construction and use of an FM radio transmitter tower and a small building (8 feet by 8 feet) on a proposed 2-acre site and use of an existing access road (0.18 acres), all situated in secs. 28 and 29, T. 29 N., R. 13 W., New Mexico Principal Meridian, San Juan County, New Mexico, on the bluffs immediately south of Farmington, New Mexico. The application was filed pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988).

After reviewing the right-of-way application, including questions regarding the impact of granting a right-of-way on other communications site users and the environment, BLM transmitted the approved right-of-way grant, effective October 4, 1988, to Voice Ministries by decision dated that same date. In its decision, BLM informed Voice Ministries that the New Mexico State Office was developing a rental schedule for communications sites and that, in the interim, an "estimated rental charge of $1,350.00 is

to be charged." Appellant was further advised that it would be notified when the actual rental charges were determined. Appellant duly submitted payment in the amount of $1,350.00 to BLM.

BLM prepared an appraisal report on August 28, 1989, which was approved by the Chief, Branch of Appraisals and Evaluation, on that same date. BLM appraised the subject communications site right-of-way using the "market comparison approach," which involved comparing the right-of-way with seven comparable private leases in Colorado, Arizona, and New Mexico, and then adjusting for differences between the subject right-of-way and such leases in terms of the factors which affect fair market rental value, i.e., time, location, terms, access, power, and coverage (Appraisal Report at 5). 1/ By means of this comparison, BLM determined that the subject right-of-way was superior to most of the private leases, which had annual rentals (adjusted to October 1988) ranging from $1,322 to approximately $4,500. In the case of one comparable, AZ-11, which had an adjusted rental of $3,000, the subject right-of-way was considered "slightly superior" to this lease. Id. at 9. With respect to another comparable, CO-05, with an adjusted rental of $4,503, the subject right-of-way was considered inferior. BLM concluded:

> Credence is given to Lease CO-05 but more weight is placed on Lease AZ-11 since it is a recent lease, and has similarities in location, power and coverage, as compared to the subject. Although the analysis indicates that Lease AZ-11 is slightly inferior to the subject due to the adjustments for terms and access, it is felt that these are nominal adjustments that do not have a significant effect on the value of the annual rental as compared to the subject.

Id. at 13. Accordingly, BLM concluded that the annual fair market rental value of the subject right-of-way is $3,000.

In its September 1989 decision, the Albuquerque District Office notified Voice Ministries that it had determined that the annual fair market rental value of the subject right-of-way was $3,000, effective as of the date of issuance of the right-of-way grant. Further, BLM stated that, in order to adjust rental charges to the calendar year, it had prorated them for the period from October 4, 1988, to January 1, 1989, determining that $750 was owed for that period. 2/ Subtracting the $1,350 already paid by Voice Ministries from the total amount deemed to be due ($3,750), BLM concluded that $2,400 was due and directed payment of that amount.

1/ The market comparison approach to appraisal, otherwise known as the comparable lease method, is the preferred method for determining the fair market rental value of communications site rights-of-way when, as here, there is sufficient comparable rental data. See MCI Telecommunications Corp., 115 IBLA 117, 120 (1990).

2/ Adjustment of the annual billing period to the calendar year was done in accordance with 43 CFR 2803.1-2(a) and is not challenged on appeal to the Board.

In its statement of reasons for appeal (SOR), appellant strongly argues that BLM "should be bound by its representations which were made to induce Voice Ministries to enter into the lease" (SOR at 1). Appellant argues that, prior to issuance of the right-of-way grant, BLM had informed it that annual rental charges would be in the approximate amount of $1,350 and BLM should be estopped from deviating in any substantial fashion from that amount.

[1] Rights-of-way may be issued subject to later determination of the annual rental payment pursuant to 43 CFR 2803.1-2(c)(3)(ii) which provides that, in order "[t]o expedite the processing of any [right-of-way] grant, * * * the authorized officer may estimate rental and collect a deposit in advance with the agreement that upon completion of a rental value determination, the advance deposit shall be adjusted according to the final fair market rental value determination." In its decision informing appellant that the right-of-way had been approved, BLM expressly advised appellant that it was collecting only an "estimated rental charge," which was subject to later revision upon determination of fair market value.

Appellant suggests that throughout the application process it was led to believe that the rental for the communications site would be approximately $1,350 per year. A review of the correspondence on which this assertion is premised, however, fails to substantiate this allegation. It is true that, in a letter dated February 23, 1988, the Area Manager, in the course of responding to an inquiry from appellant with respect to the filing of a communications site application, did state that "[t]he yearly rental fee for a communication site in south Farmington area is $1350.00 per year." However, in responding to a subsequent inquiry as to the status of the application, appellant was explicitly advised, with reference to the annual rental, that "[i]n the past this fee was $1350 per year; however, it is under reevaluation by our appraisal staff in our State Office" (SOR, Exh. B). Finally, as recited above, the decision notifying appellant of the approval of the right-of-way application expressly stated that the $1,350 charge for the first year was an "estimated rental payment" (emphasis in original) and that appellant would be notified when the "actual rental charges are determined." Thus, the totality of BLM correspondence with appellant clearly put it on notice that the annual rental was the subject of a future determination.

Nor is there any basis for appellant's assertion that BLM implicitly committed itself to an annual rental of $1,350 "subject only to minor adjustments" (SOR at 2). BLM clearly delineated the $1,350 amount as an "estimate." As such, it is merely "an approximate judgment or calculation, as of the value, amount or weight of something" (The Random House College Dictionary (1973) at 452). Not only had appellant been earlier apprised that the fee was under reevaluation by the State Office appraisal staff, but it was expressly advised when the right-of-way issued that the actual rental charges would be subsequently determined. In neither instance did BLM even suggest that the $1,350 figure would constrain the ultimate determination of fair market value. Thus, the mere fact that the fair market value was ultimately determined to be substantially greater than the preappraisal estimate does not provide any basis for barring BLM from

collecting the full fair market value, as determined by a proper appraisal. See, e.g., Southern Pacific Transportation Co., 115 IBLA 239 (1990) (rental determined to be 100 percent greater than estimate); Jancur, Inc., 93 IBLA 310 (1986) (rental determined to be 650 percent greater than estimate); Jim Doering, 91 IBLA 131 (1986) (rental determined to be 300 percent greater than estimate).

Moreover, appellant is properly charged with the knowledge that the relevant statute, 43 U.S.C. § 1764(g) (1988), mandates annual payments of the fair market value of the right-of-way. See Cyprus Western Coal Co., 103 IBLA 278, 284 (1988). And, as noted above, 43 CFR 2803.1-2(c)(3)(ii) expressly preconditions use of an estimated rental charge with an agreement by the applicant to subsequently adjust the deposit to reflect fair market value as ultimately determined. Thus, the only principle on which appellant could fairly be said to have a right to rely was that such charge as would be ultimately calculated would reflect fair market value. Indeed, by accepting the right-of-way and tendering the estimated rental appellant essentially waived all objections to the amount ultimately determined to be owing, provided that amount reflected fair market value. 3/ Accordingly, we must reject appellant's argument that simply because BLM established the estimated rental at the sum of $1,350, the Government should be estopped from determining a fair market value greater than $1,350 for the subject right-of-way.

As this Board has long held, a party challenging an appraisal determining fair market value is required to either show error in the methodology used in determining the fair market value or, alternatively, submit
its own appraisal to establish that the fair market value derived is excessive. See, e.g., High Country Communications, Inc., 105 IBLA 14, 16 (1988); Mesa Broadcasting Co., 94 IBLA 381, 382 (1986); Blue Mesa Road Association, 89 IBLA 120, 125 (1985). While appellant argues strenuously that the rental is excessive, it has neither challenged the methodology employed by BLM
nor provided its own appraisal. Thus, it has failed to carry its burden of proof on this question. 4/

3/ If, for example, an applicant wishes to determine the actual rental rate for the initial 5-year period before committing itself to the right-of-way, the applicant would properly inform BLM that it desires to await the completion of the appraisal prior to agreeing to the terms of the right-of-way. This would, of course, preclude any entry by the applicant onto the land until such time as the rental is finalized and the applicant tenders the assessed amount.

4/ As an example, appellant argues that "[l]and * * * may be purchased outright for a smaller price per acre than the price specified" for annual rental (SOR at 2). But, as this Board has noted on numerous occasions, there is no necessary correlation between the per acre purchase price for land and its per acre rental value for a communications site right-of-way, particularly when the acreage within the communications site is small. See American Telephone & Telegraph Co., 77 IBLA 110, 121-22 (1983). The proof of this reality lies in the very comparisons which BLM utilized to determine fair market value and which clearly support BLM's determination herein.

Finally, appellant contends that the rental charges which BLM seeks to impose would place an "undue burden on a Christian radio station which has been on the air for less than one year." Id. at 3. Appellant is apparently arguing that it should be accorded a lesser rental charge because of the financial burden which it would otherwise be forced to bear.

Section 504(g) of FLPMA provides authority for the Secretary of the Interior to charge less than fair market rental value in certain specified circumstances. See 43 CFR 2803.1-2(b)(2). Included among these are those situations where a right-of-way is granted to a "nonprofit corporation * * * [or where the] holder * * * provides without or at reduced charges a valuable benefit to the public." 43 U.S.C. § 1764(g) (1988). However, the record would indicate that appellant is not a nonprofit corporation and there is no indication that appellant has provided any benefit to the public without charge or at a reduced rate, such as would warrant a reduction of the annual rental under this provision.

In addition, 43 CFR 2803.1-2(b)(2) further authorizes BLM to waive or reduce rental where it determines "that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." Appellant, however, has submitted no evidence that it qualifies under the Departmental regulations for reduction of its rental charges. Compare V. Irene Wallace, 122 IBLA 349, 354-55 (1992).

Therefore, we conclude that BLM properly required appellant to pay additional rental charges, in line with its appraisal of the fair market rental value of communications site right-of-way NM 71400, for the period from October 4, 1988, to January 1, 1990.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 4 (continued)
Thus, the marketplace can simultaneously ascribe one value to land for communications purposes and a far lesser value for grazing purposes. So long as the market place puts a premium on land suitable for communication site purposes, however, BLM is required to recover that value when it leases lands for such purposes, since it is the marketplace which determines fair market value.